

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KEITH HUNTER, an individual, and  
ELAINE HUNTER, an individual

Plaintiffs,

v.

BANK OF AMERICA, N.A., et al.,

Defendants.

No. 2:16-cv-01718-RAJ

ORDER

**I. INTRODUCTION**

There are four motions before the Court.<sup>1</sup> Plaintiffs Elaine and Keith Hunter (“Plaintiffs”) filed a motion for partial summary judgment against Defendants Bank of America, N.A. (“BANA”), Nationstar Mortgage LLC (“Nationstar”), and HSBC Bank USA N.A. as Trustee for Merrill Lynch Mortgage Investors, Inc., Mortgage Pass-Through Certificates, MANA Serious 2007-OAR2 (“HSBC”). Dkt. # 76. BANA, Nationstar, and HSBC each responded and filed a cross-motion for summary judgment. Dkt. ## 89-91, 93. Having reviewed the briefing, the record, and relevant case law, the

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<sup>1</sup> As an initial matter, the Court notes that there appears to be some dispute about whether the parties properly met and conferred prior to the filing of all pending motions. *See* Dkt. # 91 at 6; Dkt. # 102 at 3. This is unacceptable. The meet and confer requirement is clearly articulated in the Court’s standing order. *See* Dkt. # 13 at 3. It is a requirement, not a suggestion. Although the Court declines to strike the parties’ motions on this basis, the Court will not hesitate to do so in the future.

1 Court finds that oral argument is unnecessary to the resolution of the matters at issue.

## 2 II. BACKGROUND

3 In March 1996, Plaintiff Elaine Hunter, now in her nineties, and her now deceased  
4 husband Donald Hunter purchased the property at 7022 NE 170th Street in Kenmore,  
5 Washington (“the property”). Dkt. # 51 ¶¶ 1, 10-11. Their son, Plaintiff Keith Hunter,  
6 began to live on the property soon after it was purchased. *Id.* ¶ 13. In December 2006,  
7 Donald and Elaine Hunter obtained a residential mortgage loan (“the loan”) in the  
8 amount of \$1,000,000 and executed a promissory note (“the Note”) with Countrywide  
9 Bank, N.A. Dkt. # 76 at 7; Dkt. # 89 at 3. The Note was secured by a deed of trust over  
10 the property (“Deed of Trust”), recorded on January 10, 2007, in King County,  
11 Washington, as instrument number 20070110000985. Dkt. # 89 at 3.

12 According to the Note, interest accrued at an initial fixed yearly rate of 7.25  
13 percent until February 1, 2012. Dkt. # 92-2 at 2. On that date, the initial fixed interest  
14 rate changed to an adjustable interest rate, which would change every year thereafter on  
15 that day based on the LIBOR Index. *Id.* Before each interest rate change date, the Note  
16 holder would calculate the new adjustable interest rate by adding 2.25 percentage points  
17 to the current Index. *Id.* The adjustable interest rate would never be greater than 12.25  
18 percent or lower than 2.25 percent. *Id.*

19 The initial monthly minimum payment until the first interest rate change date was  
20 \$3,822.46. *Id.* Because the minimum monthly payment rate was less than the interest  
21 rate, the unpaid interest was added to the principal, thereby increasing the balance. *Id.*  
22 The Note set a limit on the maximum unpaid balance, or Maximum Negative  
23 Amortization Cap, at 115 percent of the principal amount of \$1,000,000. *Id.* at 2. If the  
24 negative amortization cap was reached (that is, the unpaid balance reached \$1,150,000),  
25 before February 1, 2017, then the new minimum payment would be only the interest  
26 portion of the monthly payment. *Id.* at 3. After February 1, 2017, the “Recast Date,” and  
27 for the remainder of the loan term, the minimum payment would be the monthly amount

1 necessary to pay the loan off in full at the maturity date in substantially equal payments  
2 based on the then-current interest rate. *Id.* With respect to any changes to the minimum  
3 payment, the Note holder had to provide “notice of any changes in the amount  
4 of . . . monthly payment before the effective date of any change.” *Id.* at 4. Such notice  
5 had to include information required by law as well as “the title and telephone number of a  
6 person who will answer any question [the borrower] may have regarding the notice.” *Id.*  
7 at 4.

8 In 2007, the loan was bundled with other mortgages, converted to a mortgage-  
9 backed security, and sold to a trust overseen by HSBC. Dkt. # 76 at 8. BANA began  
10 servicing the loan after it acquired Countrywide in 2007. Dkt. # 89 at 3. BANA sent  
11 monthly mortgage statements to Elaine and Donald Hunter, and they routinely made  
12 minimum monthly payments. *Id.* at 4.

13 On August 15, 2011, BANA sent a letter to Ms. Hunter, notifying her that the  
14 “interest rate is scheduled for an adjustment” on February 1, 2012. Dkt. # 92-4 at 2. The  
15 letter stated that the “New Interest Rate” was 7.25 percent and the “Anticipated Principal  
16 Balance” was \$1,147,279.63. *Id.* The “New Principal and/or Interest payment” was  
17 \$6,931.48, and this new payment was effective on November 1, 2011. *Id.* The letter  
18 stated that changes in the interest rate were “based on the NA,” which was an undefined  
19 term. *Id.* The letter provided a phone number for Customer Service Representatives as  
20 well as a number to contact “dedicated Loan Consultants” if Ms. Hunter had concerns  
21 about her ability to make the new payments. *Id.* at 3.

22 On November 14, 2011, Ms. Hunter tried to make a payment of \$9,491.70 via  
23 credit card for the months of October and November. Dkt. # 90 at 5. The next day, she  
24 was informed that credit card payments are not accepted and that the amount necessary to  
25 bring the loan current was \$10,120.26, based on a monthly payment of \$5,060.13 for  
26 October 2011 and the same amount for November. *Id.* at 5; Dkt. # 92-7 at 2. A week  
27 later, Ms. Hunter made a payment of \$5,060.13, and the following week, she made a

1 second payment of \$5,060.13. Dkt. # 90 at 5. Both payments were reversed by BANA  
2 as “insufficient” to bring the loan current. *Id.*

3 On December 19, 2011, BANA sent Ms. Hunter a Notice of Intent to Accelerate,  
4 notifying her that \$16,684.87 was due and that she was in default. *Id.* Plaintiffs  
5 continued to make monthly payments, from December 2011 onwards, all of which  
6 BANA reversed as insufficient to bring the loan current. *Id.* On March 9, 2012, BANA  
7 sent Ms. Hunter a letter informing her that she owed payments for five months, at a rate  
8 of \$5,060.13 each month. Dkt. # 77-3 at 27.

9 Beginning in December 2011, Plaintiffs sought to obtain a loan modification. Dkt.  
10 # 90 at 7. Between January 2012 through September 2012, BANA discussed a potential  
11 loan modification with Plaintiffs. *Id.* Plaintiff spoke with BANA representative Paul D.  
12 Mills about the documents necessary for their loan modification application and met with  
13 him several times to discuss the modification. Dkt. # 76 at 11.

14 On June 2, 2012, Ms. Hunter received a letter notifying her that she met the  
15 criteria to apply for a new modification program announced as a result of the U.S.  
16 Department of Justice and State Attorneys General global settlement with major  
17 servicers, including BANA. Dkt. # 77-3 at 29. On June 21, 2012, she received a second  
18 letter again encouraging her to contact a BANA home loan specialist to apply for this  
19 loan modification program. *Id.* at 31. Plaintiffs continued to meet with Mr. Mills over  
20 the summer of 2012 and submitted additional documents for the loan modification  
21 application. Dkt. # 76 at 12; Dkt. # 90 at 7. Several weeks later, Mr. Mills informed  
22 Keith Hunter that BANA had “sold the note” and that he was no longer able to assist with  
23 the loan modification application. Dkt. # 76 at 12. In October 2012, BANA sent the  
24 Hunters a notice stating that their loan would be referred to foreclosure. *Id.* at 13.

25 On November 1, 2012, the loan was transferred from BANA to Specialized Loan  
26 Servicing (“SLS”). Dkt. # 92 ¶ 43. A month later, SLS sent the Ms. Hunter a Notice of  
27 Default, asserting that she failed to pay the November 2011 mortgage payment. *Id.* The

Hunters contacted and obtained assistance from housing counselors at Parkview Services in the application of a loan modification with SLS. Dkt. # 76 at 13. Just before SLS finalized the loan modification, SLS transferred loan servicing responsibility to Nationstar. *Id.* at 14.

On April 1, 2014, Nationstar began servicing the mortgage. *Id.* The amount due on the loan at that time was \$140,843.36. Dkt. # 91 at 9. In June 2014, Nationstar sent Ms. Hunter a letter stating that it was unable to offer her a loan modification. Dkt. # 91 at 10. Nationstar indicated that she had been evaluated for several “Loss Mitigation Options” but had been denied. Dkt. # 77-5 at 40. Specifically, the letter indicated that Ms. Hunter was denied three programs: (1) HAMP Tier 1 was denied due to an ineligible mortgage; (2) HAMP Tier II was not available; and (3) Standard Modification was denied because of missing documents. *Id.*

In 2015, Nationstar began nonjudicial foreclosure proceedings. Dkt. # 76 at 15; Dkt. # 91 at 11. Nationstar participated in three separate mediation sessions with Ms. Hunter on January 11, 2016, March 28, 2016, and April 20, 2016. Dkt. # 91 at 11. Nationstar participated in the foreclosure mediation “on behalf of HSBC as its attorney in fact.” *Id.* Nationstar stated that it performed a Net Present Value test (“NPV”) in advance of the mediation sessions to determine whether the loan was eligible for a loan modification review. *Id.* In the mediation sessions, Nationstar offered Ms. Hunter a loan modification. *Id.* Ms. Hunter declined the offer. *Id.* at 12.

On July 29, 2016, Plaintiffs filed a complaint in King County Superior Court, and on November 4, 2016, BANA removed the case to this Court. Dkt. # 1. A foreclosure sale on the property was scheduled for January 6, 2017. Dkt. # 15 at 2. Plaintiffs, Nationstar, and HSBC stipulated to an entry of a preliminary injunction enjoining the foreclosure sale of the property subject to monthly payments of \$3,226.72 into the Court’s registry. Dkt. # 15. On December 5, 2016, the Court granted the stipulated motion. Dkt. # 18. On May 4, 2018, Plaintiff filed a Third Amended Complaint, Dkt.

# 51, which HSBC and Nationstar subsequently moved to dismiss, Dkt. # 56. The Court granted in part and denied in part Defendants' motion. Dkt. # 61.

On May 14, 2020, Plaintiffs filed this motion for partial summary judgment on some of the remaining claims against BANA, Nationstar, and HSBC. Dkt. # 76. Each defendant responded and filed its own motion for summary judgment. Dkt. ## 89-91, 93.

### III. LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets the initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

However, the nonmoving party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). Uncorroborated allegations and "self-serving testimony" will not create a genuine issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002); *T.W. Elec. Serv. v. Pac Elec. Contractors Ass'n*, 809 F. 2d 626, 630 (9th Cir. 1987). The court need not, and will not, "scour the record in search of

a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also White v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (explaining that the court need not “speculate on which portion of the record the nonmoving party relies, nor is it obliged to wade through and search the entire record for some specific facts that might support the nonmoving party’s claim”). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis original).

#### IV. DISCUSSION

Plaintiffs Elaine and Keith Hunter seek partial summary judgment against BANA, Nationstar, and HSBC (collectively “Defendants”) for violations of the Washington Consumer Protection Act (“CPA”), reserving the issue of damages for trial. Dkt. # 76 at 7. Plaintiff Elaine Hunter, individually, also seeks partial summary judgment against BANA for breach of contract, reserving the issue of damages for trial. *Id.* BANA filed a motion for summary judgment on Plaintiffs’ claims for violation of the CPA, breach of contract, and breach of the implied covenant of good faith and fair dealing brought against it. Dkt. # 90 at 2. Nationstar filed a cross-motion for summary judgment as to Plaintiffs’ CPA, breach of contract, and duty of good faith and fair dealing claims brought against it. Dkt. # 91. HSBC filed a cross-motion for summary judgment on Plaintiffs’ CPA claim brought against it. Dkt. # 93. The Court considers the parties’ arguments in turn.

##### A. Claims Against BANA

###### 1. CPA Claim Against BANA

Plaintiffs allege that BANA violated the CPA. Dkt. # 76 at 19-24. BANA argues that Plaintiffs’ CPA claim is untimely. Dkt. # 89 at 9. The Court has already rejected this argument in its prior order but will briefly address it here. *See* Dkt. # 27 at 4. Raised initially in its motion to dismiss, BANA’s argument is that the CPA claim’s four-year



1 statute of limitations began to run in November 2011, when BANA first rejected one of  
 2 Plaintiffs' payments. Dkt. # 89 at 9. The argument still, however, fails to address the  
 3 Court's previous finding that the statute had been tolled pursuant to the discovery rule.  
 4 *See* Dkt. # 27 at 4-5. Under that rule, the statute was tolled until Plaintiffs knew or  
 5 should have known the essential elements of the cause of action. *Id.* (citing *Matter of*  
 6 *Estates of Hibbard*, 826 P.2d 690, 694 (Wash. 1992)); *see also Pruss v. Bank of Am. NA*,  
 7 No. C13-1447 MJP, 2013 WL 5913431, at \*2 (W.D. Wash. Nov. 1, 2013) ("Under [the  
 8 'discovery rule'], fraud is considered discovered when, with the exercise of reasonable  
 9 diligence, it could have been discovered.").

10 Plaintiffs alleged that they could not have known that they had a CPA claim until  
 11 August 2012 when BANA representative Paul D. Mills informed them that BANA had  
 12 sold the Note, that they could not move forward with the loan modification application  
 13 they had worked on with him, and that BANA subsequently characterized their loan as in  
 14 default. Dkt. # 27 at 4. Before then, Plaintiffs believed that BANA was modifying their  
 15 loan and that the returned mortgage payments were merely the result of internal  
 16 miscommunications. *Id.* at 4-5. BANA does not dispute Plaintiffs' allegations or provide  
 17 any evidence to undermine Plaintiffs' evidence demonstrating that they had been working  
 18 on a loan with a BANA representative for months. The Court therefore again rejects  
 19 BANA's argument that Plaintiffs' CPA claim is untimely.

20 To prove a CPA claim, Plaintiffs must establish five elements: "(1) unfair or  
 21 deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;  
 22 (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge*  
 23 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). "[A]  
 24 claim under the Washington CPA may be predicated upon a per se violation of statute, an  
 25 act or practice that has the capacity to deceive substantial portions of the public, or an  
 26 unfair or deceptive act or practice not regulated by statute but in violation of public  
 27 interest." *Klem v. Washington Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013). If an act



1 or practice is not per se unfair or deceptive, the plaintiff must prove that the conduct “is  
 2 ‘unfair’ or ‘deceptive’ under a case-specific analysis of those terms.” *Mellon v. Reg’l Tr.*  
 3 *Servs. Corp.*, 334 P.3d 1120, 1126 (Wash. Ct. App. 2014). “Failure to satisfy even one of  
 4 the elements is fatal to a CPA claim.” *Sorrel v. Eagle Healthcare*, 38 P.3d 1024, 1027  
 5 (Wash. Ct. App. 2002). Parties filing suit under the CPA may recover actual damages,  
 6 costs, and reasonable attorney’s fees. RCW 19.86.090. When the parties do not dispute  
 7 whether a defendant’s conduct occurred, “the question whether those actions give rise to  
 8 a CPA violation is reviewable as a question of law.” *Micro Enhancement Int’l, Inc. v.*  
 9 *Coopers & Lybrand, LLP*, 40 P.3d 1206, 1220 (Wash. Ct. App. 2002).

10 BANA alleges that Plaintiffs fail to provide evidence to support the first, third,  
 11 fourth, and fifth elements of their CPA claim. The second element, “occurring in trade or  
 12 commerce” is established where there is a “sale of assets or services, and any commerce  
 13 directly or indirectly affecting the people of the state of Washington.” RCW  
 14 19.86.010(2). The term “assets” includes real property. RCW 19.86.010(3). The instant  
 15 dispute over a loan involving real property in Washington satisfies this second element.  
 16 The Court will consider the remaining disputed elements in turn.

17 *a. Unfair or Deceptive Act or Practice*

18 Because the CPA does not define the terms “deceptive” or “unfair,” the Supreme  
 19 Court of Washington “has allowed the definitions to evolve through a gradual process of  
 20 judicial inclusion and exclusion.” *Klem*, 295 P.3d at 1186 (internal quotations and  
 21 citation omitted). For example, Washington courts have concluded that  
 22 “[m]isrepresentation of the material terms of a transaction or the failure to disclose  
 23 material terms violates the CPA.” *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 50  
 24 (Wash. 2012). “Even accurate information may be deceptive if there is a representation,  
 25 omission or practice that is likely to mislead.” *Id.* at 115 (internal quotations and citation  
 26 omitted). Indeed, courts have concluded that a defendant “need not affirmatively state an  
 27 untrue fact to have committed a deceptive practice.” *See Stephens v. Omni Ins. Co.*, 159

1 P.3d 10, 19 (Wash. Ct. App. 2007), *aff'd sub nom. Panag v. Farmers Ins. Co. of*  
2 *Washington*, 204 P.3d 885 (Wash. 2009) (holding that defendant's practice of including  
3 miscellaneous service charges unrelated to the mortgage on a mortgage payoff statement  
4 "has the capacity to deceive because it creates the misleading appearance that the  
5 mortgage cannot be released unless the miscellaneous charges . . . are paid").

6 Washington courts have also held that neither intent nor actual deception is  
7 required to establish that an act is deceptive under the CPA. *Id.* Courts have explained  
8 that "[a] plaintiff need not show that the act in question was *intended* to deceive, but that  
9 the alleged act had the *capacity* to deceive a substantial portion of the public." 719 P.2d  
10 at 535 (emphasis original); *see Hangman Ridge*, 719 P.2d 531, 535 (Wash. 1986). With  
11 respect to "unfair" acts, a defendant's act or practice might be unfair "if it offends public  
12 policy as established by statutes [or] the common law, or is unethical, oppressive, or  
13 unscrupulous, among other things." *Mellon*, 334 P.3d at 1126. The Washington  
14 Supreme Court has noted that a defendant's act or practice might be "unfair" if it "causes  
15 or is likely to cause substantial injury to consumers which is not reasonably avoidable by  
16 consumers themselves and is not outweighed by countervailing benefits." *Id.* at 489-90.

17 Here, the Court finds that, as a matter of law, BANA's undisputed conduct in the  
18 form of misrepresentations of the amount due on the loan constitutes unfair or deceptive  
19 acts. Even if the Court were to accept BANA's position that it did not misrepresent the  
20 amounts owed, BANA's representations to Ms. Hunter were, at minimum, likely to  
21 mislead, which is sufficient to establish deceptive acts under the CPA. *See* 285 P.3d at  
22 50. BANA misrepresented to Plaintiffs the amount due on the loan and failed to  
23 adequately explain payment adjustments on multiple occasions. *See* Dkt. # 81 at 2; Dkt.  
24 # 92-4; Dkt. # 77-3 at 27. First, it is undisputed that BANA provided Plaintiffs with  
25 incorrect information on November 14, 2011 when it advised Ms. Hunter that she owed  
26 \$5,060.13 for October 2011 and \$5,060.13 for November 2011. Dkt. # 89 at 5; Dkt. # 81  
27 at 2. BANA claims that Ms. Hunter's subsequent two payments of \$5,060.13 were

1 “insufficient” payments to bring the loan current based on alternative internal  
2 calculations of the amount due for November 2011. Dkt. # 89 at 12-13. The Court finds,  
3 however, that BANA’s misrepresentation of the amount due to bring the loan current  
4 precluded Ms. Hunter from making a “sufficient payment.” For even if Ms. Hunter had  
5 made a single payment of \$10,120.26, she would have still not made a sufficient payment  
6 according to BANA because, they contend, she owed \$11,991.61 at the time. *Id.* at 13. It  
7 was therefore BANA’s misrepresentation of the amount due to bring the loan current that  
8 precluded Ms. Hunter from bringing her loan current in November 2011.

9 BANA’s attempt to dismiss its own misrepresentation by claiming it had  
10 communicated the proper amount owed to Ms. Hunter in a letter several months prior is  
11 unsupported and unavailing. *Id.* A closer look of BANA’s August 15, 2011 letter to Ms.  
12 Hunter reveals inaccuracies and omissions regarding the change in minimum payment  
13 and interest rate. Dkt. # 92-4 at 2. Although BANA correctly stated in the letter that Ms.  
14 Hunter’s interest rate was scheduled for an adjustment on February 1, 2012, BANA later  
15 stated that the “New Interest Rate” was 7.25 percent. *Id.* This was not the new interest  
16 rate that would go into effect on February; it was the initial fixed interest rate that had  
17 been in effect for years, since December 2006. *See* Dkt. # 92-2 at 2.

18 Furthermore—and contrary to BANA’s allegation—BANA failed to adequately  
19 explain the payment adjustment in its August 2011 letter. *See* Dkt. # 89 at 12. BANA  
20 asserts that it “adequately explained the issue of the Negative Amortization Cap when it  
21 sent correspondence to Plaintiffs in August 2011.” Dkt. # 89 at 17. It did no such thing.  
22 *See* Dkt. # 92-4 at 2-3. BANA did not use the term “negative amortization” at all in the  
23 letter. It used the term “NA” when it stated that “[c]hanges in your interest rate are based  
24 on the NA,” but it did not define the term. *Id.* at 2. Even if the Court were to presume  
25 that BANA used “NA” as shorthand for “negative amortization,” the letter would have  
26 been inaccurate because changes to the interest rate were not, in fact, affected by the  
27 negative amortization under the terms of the Note. Dkt. # 92-2 at 2. Only the minimum

1 payment was changed when the negative amortization cap was reached under the terms  
2 of the Note; the interest rate was fixed until February 1, 2012. *Id.*

3 Moreover, BANA's calculation of the amount due is itself problematic.  
4 According to the terms of the Note, the initial monthly minimum payment expired on  
5 February 1, 2017 or when the maximum negative amortization was reached, whichever  
6 was sooner. Dkt. # 92-2 at 3. The negative amortization cap was \$1,150,000. *Id.* at 2.  
7 In its August 2011 letter, BANA noted that the anticipated principal balance was  
8 \$1,147,279.63. Dkt. # 92-4 at 2. In its briefing to the Court, BANA explained that it had  
9 determined that the loan would soon reach the negative amortization cap and that  
10 Plaintiffs' payments would need to increase. Dkt. # 90 at 4. But this was never  
11 communicated to Plaintiffs. Indeed, BANA failed to provide any explanation as to why it  
12 chose to change the minimum monthly payment before the maximum negative  
13 amortization cap was reached or to why Ms. Hunter could not apply the difference  
14 between the anticipated principal balance and the negative amortization cap to her next  
15 payment so that it could be reached, pursuant to the terms of the Note. The Court  
16 refrains, however, from opining on the correct amount due based on the negative  
17 amortization cap, as such a matter is properly reserved for a factfinder who may weigh all  
18 the evidence. Still, the Court concludes that BANA's misrepresentation, omissions, and  
19 failure to explain the payment adjustment in the August 2011 letter and BANA's  
20 undisputed misrepresentation of the amount due in its instruction to Ms. Hunter on  
21 November 15, 2011 are sufficient to establish deceptive acts under the CPA.

22 In addition, while the parties dispute the accuracy of BANA's representations in  
23 its subsequent monthly statements or payment coupons with Ms. Hunter, it is undisputed  
24 that the outstanding amount provided for the month of February was contradicted by  
25 BANA in a March 9, 2012 letter to Ms. Hunter. Dkt. # 77-3 at 27. In the letter, sent in  
26 response to Ms. Hunter's inquiry about the outstanding amount due on her loan, BANA  
27 indicated that Ms. Hunter owed five monthly payments of \$5,060.13 plus late charges

1 and other fees for a total amount of \$26,059.46. *Id.* In its letter, BANA noted that this  
2 amount was valid through March 16, 2012. *Id.* This contradicts both the monthly  
3 payment amount and the past due amount indicated in the monthly statement for the same  
4 period. According to the monthly statement, the monthly interest-only payment due was  
5 \$4,464.39, not \$5,060.13 as indicated in the March letter. *Id.* Ms. Hunter's past due  
6 payment amount as of February 28, 2012 was \$32,676.60 in the monthly statement, as  
7 opposed to the \$26,059.46 amount indicated as past due in the letter. Dkt. # 92-10 at 2;  
8 Dkt. # 77-3 at 27. These inconsistent calculations are simply irreconcilable: the amount  
9 Ms. Hunter owed BANA on March 16, 2012 was less than the amount owed on February  
10 28, 2012 even though BANA had refused to accept any payments from Ms. Hunter since  
11 November 2011. Based on these undisputed facts, the Court concludes that BANA's  
12 repeated misrepresentations of the amount owed by Plaintiffs constitute deceptive acts in  
13 satisfaction of the first element of a CPA claim.

14 Plaintiffs allege that in addition to BANA's misrepresentations, BANA committed  
15 a deceptive or unfair act under the CPA when it failed to process Plaintiffs' loan  
16 modification or consider alternatives. *See* Dkt. # 76 at 23-24. Because there are disputes  
17 of material fact regarding whether Plaintiffs provided all necessary documentation in  
18 support of a loan modification and over what was communicated to them by BANA  
19 representative Paul D. Mills, the Court cannot conclude as a matter of law that BANA  
20 committed a deceptive or unfair act based on the allegation that it failed to process  
21 Plaintiffs' loan modification or consider alternatives. *See id.*; Dkt. # 89 at 7-8. The Court  
22 therefore denies summary judgment to both parties on this claim based on allegations that  
23 BANA committed a deceptive or unfair act by failing to process Plaintiffs' loan  
24 modification or consider alternatives.

25 *b. Public Interest Impact*

26 In a private action in which an unfair or deceptive act is alleged under the CPA, a  
27 plaintiff may establish the element of public interest impact by showing that the act had

1 the capacity to injure other persons. RCW 19.86.093(3). In *Bain v. Metropolitan*  
 2 *Mortgage Group*, the Supreme Court of Washington concluded that because a defendant  
 3 was involved with a significant number of mortgages across the country, a finding that its  
 4 language was unfair or deceptive “would have a broad impact.” 285 P.3d at 51.

5 Similarly, because BANA’s omissions and misrepresentations are not uniquely limited to  
 6 a single incident, the Court reiterates its conclusion that such conduct would have a broad  
 7 impact. *See* Dkt. # 27 at 5-6. The element is satisfied here.

8 *c. Injury*

9 Injuries compensable under the CPA “are relatively expansive.” *Frias v. Asset*  
 10 *Foreclosure Servs., Inc.*, 334 P.3d 529, 538 (Wash. 2014). Under the CPA, a plaintiff  
 11 can prove injury based on unlawful debt collection practices even where there is no  
 12 controversy as to the amount or validity of the underlying debt. *Panag v. Farmers Ins.*  
 13 *Co.*, 204 P.3d 885 (Wash. 2009). Where “a business demands payment not lawfully due,  
 14 the consumer can claim injury for expenses he or she incurred in responding, even if the  
 15 consumer did not remit the payment demanded.” 334 P.3d at 538. A plaintiff can satisfy  
 16 the injury element by showing that the plaintiff’s “property interest or money is  
 17 diminished because of the unlawful conduct even if the expenses caused by the statutory  
 18 violation are minimal.” *Panag*, 204 P.3d at 899 (quoting *Mason v. Mortg. Am., Inc.*, 792  
 19 P.2d 142 (Wash. 1990)). This can include “[i]nvestigative expenses, taking time off from  
 20 work, travel expenses, and attorney fees.” *Walker v. Quality Loan Serv. Corp. of Wash.*,  
 21 308 P.3d 716 (Wash. 2013). Finally, “[t]he injury element can be met even where the  
 22 injury alleged is both minimal and temporary.” *Frias*, 334 P.3d at 538.

23 There is no dispute that Plaintiffs’ account went into default for making  
 24 insufficient payments, Dkt. # 89 at 6, which were based on BANA’s deceptive  
 25 communications. This Court has already held that such default constitutes injury for a  
 26 CPA claim. *See* Dkt. # 27 at 6. Accrued interest, late charges, and property inspection  
 27

1 fees constitute injury as well. *See* Dkt. # 76 at 16-17; Dkt. # 100 at 10. Plaintiff has  
2 satisfied the injury element of the CPA claim.

3 *d. Causation*

4 With respect to causation, Plaintiffs must establish that BANA's deceptive acts  
5 were the proximate cause for Plaintiffs' injury. *See Indoor Billboard/Washington, Inc. v.*  
6 *Integra Telecom of Washington, Inc.*, 170 P.3d 10, 22 (Wash. 2007). Under the  
7 proximate cause standard, Plaintiffs must establish that "but for the defendant's unfair or  
8 deceptive practice, [the plaintiff] would not have suffered an injury." *Id.* BANA argues  
9 that "[i]t was Plaintiffs' failure to make those payments, not any alleged  
10 miscommunication or miscalculation from BANA that resulted in Plaintiffs' ongoing  
11 default." Dkt. # 89 at 10. The Court disagrees.

12 BANA told Ms. Hunter an amount to pay in November and then rejected payment  
13 of that amount. As discussed above, it was BANA's misrepresentation of the amount due  
14 to bring the loan current that precluded Ms. Hunter from making a "sufficient payment."  
15 Subsequent misrepresentations of payment and failures to explain payment due  
16 perpetuated the default and precluded Plaintiffs from bringing their loan current. The  
17 undisputed evidence here demonstrates that Plaintiffs repeatedly inquired with BANA  
18 about the correct amount to pay on their loan to bring it current and continued to make  
19 payments of interest due despite the fact that BANA rejected payment.<sup>2</sup> The Court  
20 concludes that there is no genuine dispute as to causation: BANA's deceptive acts were  
21 the proximate cause of Plaintiffs' injury.

22 Having satisfied the fifth and final element of their CPA claim with respect to the  
23 above allegations, Plaintiffs are entitled to summary judgment on this claim with respect  
24 to these allegations. The Court **GRANTS** summary judgment to Plaintiffs on the CPA

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25 <sup>2</sup> Although BANA contends that it was not required to accept Plaintiffs' payments, the  
26 Court does not understand why payments were not accepted, particularly given the fact  
27 that Plaintiffs have already paid a total of \$164,562.92 into the Court registry as of the  
28 date of this Order. *See* Dkt. # 18.



1 claim with respect to BANA's misrepresentations of the amounts due to bring the loan  
2 current. The Court **DENIES** summary judgment to both parties on the CPA claim based  
3 on allegations that BANA refused to process Plaintiffs' loan modification application or  
4 consider alternatives.

5       2.       *Breach of Contract Claim Against BANA*

6       Ms. Hunter contends that BANA breached the terms of the Note when it failed to  
7 provide notice of the approaching negative amortization cap, the adjusting interest rate,  
8 and payment options. Dkt. # 76 at 29. Ms. Hunter claims that BANA also breached the  
9 Note by failing to correctly calculate the November 2011 payment in light of the amount  
10 remaining in the negative amortization cap and by refusing to accept payments on the  
11 loans. *Id.* Finally, Ms. Hunter argues that Plaintiffs' "underpayments" should have been  
12 accepted based on the doctrines of waiver and estoppel. *Id.*

13       BANA claims that it "adequately explained the issue of the Negative Amortization  
14 Cap when it sent correspondence to Ms. Hunter in August 2011 and when Mr. Mills  
15 spoke with Plaintiffs in January 2012." Dkt. # 89 at 17. BANA also argues that Ms.  
16 Hunter was notified each month of the amount past due on Plaintiffs' loan. *Id.* at 18.  
17 BANA claims that, under the terms of the Note, BANA had the right to require borrower  
18 "to pay immediately in full" when the borrower was in default. *Id.* at 20. Therefore,  
19 BANA claims that "even if there was a breach the damages suffered by Plaintiffs, their  
20 ongoing default, was not a result of any breach by BANA." Dkt. # 90 at 21.

21       Under Washington law, a breach of contract claim is established by the following  
22 elements: (1) the existence of a contract; (2) a material breach of the contract; and  
23 (3) resulting damage. *St. John Med. Ctr. v. State ex rel. Dep't of Soc. & Health Servs.*, 38  
24 P.3d 383, 390 (Wash. Ct. App. 2002). Here, the Note is a contract between Ms. Hunter  
25 and—at the time—BANA. The Note requires "notice of any changes in the amount of  
26 [the] monthly payment before the effective date of any change." Dkt. # 77-1 at 4. The  
27 Court has already concluded that BANA failed to provide accurate or adequate notice of

1 changes in the monthly payment with respect to the August 2011 letter. Such a failure to  
2 provide proper notice constitutes a material breach of the Note's notice requirement.  
3 This material breach precluded Plaintiffs from bringing their loan current, resulting in  
4 damages in the form of accumulated interest and late charges at minimum. The Court  
5 concludes that the elements of a breach of contract claim have been met here as a matter  
6 of law and Plaintiff is entitled to summary judgment on this claim with respect to  
7 BANA's failure to provide proper notice of payment changes.

8 However, the Court is unpersuaded that BANA's failure to provide information  
9 about the negative amortization cap in its August 2011 letter is a clear breach of the terms  
10 of the Note as a matter of law. Indeed, the parties dispute whether BANA's  
11 representative, Mr. Mills, had adequately discussed the negative amortization issue with  
12 Plaintiffs in January 2012. The existence of material factual disputes on this matter  
13 precludes summary judgment on this claim with respect to this allegation.

14 The Court also concludes that Plaintiff has not demonstrated that BANA breached  
15 the Note when it refused to credit Plaintiffs' payments, as this was not prohibited by the  
16 Note. Similarly, Plaintiffs' brief argument about waiver and estoppel, supported by a  
17 single case decided over sixty years ago, is insufficient to meet Plaintiffs' burden to  
18 affirmatively demonstrate that no reasonable trier of fact could find other than for  
19 Plaintiffs on whether waiver and estoppel apply here as a matter of law. The Court is  
20 unpersuaded and denies summary judgment on this issue.

21 In conclusion, the Court **GRANTS** summary judgment for Plaintiffs on the breach  
22 of contract claim with respect to BANA's failure to provide proper notice of payment  
23 changes. The Court **DENIES** summary judgment to both parties on the breach of  
24 contract claim based on the allegation that BANA breached the Note because it did not  
25 adequately explain the role of the negative amortization cap in the adjustment of  
26 payments. Finally, the Court **DENIES** summary judgment to Plaintiff on the breach of  
27 contract claim based on allegations of waiver and estoppel.

1           3. *Breach of the Implied Covenant of Good Faith and Fair Dealing Claim Against*  
2           *BANA*

3           BANA alleges that it is entitled to summary judgment on Plaintiffs' breach of the  
4 implied covenant of good faith and fair dealing claim because it "is derivative of  
5 Plaintiffs' breach of contract claim, and fails for the same reasons." *Id.* at 23. BANA  
6 claims there is no evidence to support such a claim. *Id.* at 9. Under Washington law,  
7 "[t]here is in every contract an implied duty of good faith and fair dealing" that "obligates  
8 the parties to cooperate with each other so that each may obtain the full benefit of  
9 performance." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wash. 2d 102, 112–  
10 13, 323 P.3d 1036, 1041 (2014).

11           BANA claims that it "cooperated fully in its servicing of the Loan and handling of  
12 the contract," by notifying Plaintiffs of the monthly payment change due to negative  
13 amortization in August 2011 and providing the necessary amounts to bring the loan  
14 current, among other things. Dkt. # 90 at 24. The Court disagrees. The Court has  
15 concluded as a matter of law that BANA breached the terms of its contract with Ms.  
16 Hunter when it failed to provide accurate or adequate notice of changes in the monthly  
17 payment. Contrary to BANA's assertion, BANA's failure precluded it from meeting its  
18 obligation to cooperate with Plaintiffs so that they could obtain the full benefit of  
19 performance. The Court therefore **GRANTS** summary judgment for Plaintiffs on this  
20 claim.

21 **B. Plaintiffs' Claims Against Nationstar**

22           Plaintiffs filed three actions against Nationstar: (1) a CPA claim; (2) a breach of  
23 contract claim; and (3) a breach of the duty of good faith and fair dealing. Dkt. # 91 at 6.  
24 Plaintiffs move for summary judgment only on the CPA claim. Dkt. # 76 at 7.  
25 Nationstar moves for summary judgment on all three claims. Dkt. # 91 at 6. The Court  
26 will consider the claims as raised in each motion below.

1           *1. CPA Claim Against Nationstar*

2           Plaintiffs allege that Nationstar violated the CPA when it failed to obtain a  
3 complete file on the loan in the transfer from its prior loan servicer, ignored the loan  
4 modification application that Plaintiffs had submitted to SLS, failed to communicate and  
5 consider alternatives to foreclosure as required under the Foreclosure Fairness Act  
6 (“FFA”) during mediation, and failed to prepare for and participate in mediation in good  
7 faith. Dkt. # 76 at 24-25; Dkt. # 102 at 6. Nationstar disputes each allegation. It asserts  
8 that there “is no evidence that any documents of information were omitted during the  
9 service-transfer.” Dkt. # 91 at 7. It claims that it did consider the pending loan  
10 modification application but ultimately denied it because Ms. Hunter failed to submit  
11 required information. *Id.* Nationstar argues that it considered and communicated  
12 alternatives to foreclosure, offering as evidence the “favorable loan modification that  
13 would have brought the long-delinquent loan current” that Nationstar offered to Ms.  
14 Hunter. *Id.* Finally, points to the absence of any “bad faith” conduct in the mediator’s  
15 report as evidence that Nationstar met its obligation to act in good faith in the mediation.  
16 Dkt. # 91 at 24.

17           In addition to denying Plaintiffs’ factual allegations, Nationstar asserts several  
18 legal arguments. Nationstar claims that Plaintiffs cannot establish that its acts are “unfair  
19 or deceptive” as a matter of law because Plaintiffs rely on a misinterpretation of various  
20 federal statutes. Dkt. # 91 at 15. Nationstar also argues that Plaintiffs cannot meet the  
21 injury or causation elements of a CPA claim. *Id.* at 6. Finally, Nationstar argues that  
22 Plaintiff Keith Hunter has no standing to assert any claims arising from servicing of the  
23 loan because he is not a party to the loan. *Id.*

24           *a. Unfair or Deceptive Act or Practice*

25           As an initial matter, the Court rejects Nationstar’s argument that Plaintiffs’ CPA  
26 claim fails because it is based on a misinterpretation of federal statutes. In the Court’s  
27 prior ruling on Nationstar and HSBC’s motion to dismiss, the Court concluded that

1 Plaintiffs had plausibly alleged that Nationstar engaged in unfair or deceptive conduct  
 2 under federal statutes in satisfaction of a CPA claim. The Court determined the  
 3 following:

4 The FFA requires that parties engaged in a foreclosure mediation mediate in “good  
 5 faith.” RCW. 61.24.163(10). The FFA also states, in relevant part, that “[i]t is an  
 6 unfair or deceptive act in trade or commerce and an unfair method of competition  
 7 in violation of the [CPA] . . . for any person or entity to: (a) [v]iolate the duty of  
 8 good faith under RCW 61.24.163.” RCW 61.24.135. The Court thus concludes  
 9 that violation of this statute would constitute a *per se* violation of the CPA. Here,  
 10 Plaintiffs allege that Nationstar did not participate in mediation in good faith  
 11 because Nationstar (1) did not provide Plaintiffs with accurate information  
 12 regarding which loss options were available to them; (2) did not identify which  
 13 options Plaintiffs were eligible for; and (3) did not evaluate, discuss, or offer the  
 14 loss mitigation options that were actually available to Plaintiffs; and (4) proposed  
 15 instead that Plaintiffs double their monthly payments.

16 Dkt. # 61 at 8 (citing Dkt. # 51 at ¶¶142-46; Dkt. # 58 at 15).

17 Under RCW 61.24.163(9), the mediation participants “must address the issues of  
 18 foreclosure that may enable the borrower and the beneficiary to reach a resolution,  
 19 including but not limited to reinstatement, modification of the loan, restructuring of the  
 20 debt, or some other workout plan.” Based on Plaintiffs’ allegations, the Court concluded  
 21 that Plaintiffs “adequately set forth a violation of the duty of good faith under RCW  
 22 61.24.163, and thus adequately plead an ‘unfair or deceptive act’ under the CPA.” *Id.*  
 23 The Court also determined that Plaintiffs “adequately ple[d] violations of federal laws,  
 24 which could serve as the basis for a CPA claim,” such as Nationstar’s alleged violation of  
 25 12 C.F.R. 1024.41(c)(1)(i)’s requirement that loan servicers evaluate all loan  
 26 modification applications. *Id.* at 9. The Court here reaffirms its conclusion that  
 27 Plaintiffs’ allegations, if true, would satisfy the first element of a CPA claim.

28 The Court next considers Nationstar’s assertion that it is entitled to summary  
 judgment based on the foreclosure mediator’s finding that Nationstar did not act in bad  
 faith. Dkt. # 91 at 24. Nationstar claims such a finding by the mediator, or lack thereof,  
 is “binding” in this matter. *Id.* at 24. The Court disagrees. First, the record indicates that

1 the mediator made no findings as to good or bad faith with respect to Nationstar's  
2 participation in mediation. Dkt. # 97 at 76-78. Second, the statute itself claims states that  
3 "[i]n any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation  
4 that it failed to act in good faith." RCW 61.24.163(14)(a). The Court concludes that the  
5 absence of a mediator's finding that Nationstar acted in bad faith does not preclude  
6 Plaintiff from making a claim of bad faith in the foreclosure mediation process. *See*  
7 *Krusee v. Bank of Am., N.A.*, No. C13-824 RSM, 2013 WL 3973966, at \*3 (W.D. Wash.  
8 July 30, 2013) (holding that "allegations concerning bad faith can be made even when the  
9 mediator has not so certified").

10 Next, the Court must consider whether any genuine dispute of material precludes  
11 summary judgment on this claim. With respect to Plaintiffs' motion for summary  
12 judgment, Plaintiffs must affirmatively demonstrate that no reasonable trier of fact could  
13 find other than for Plaintiffs because they have the burden of proof with respect to their  
14 CPA claim at trial. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).  
15 With respect to Nationstar's motion for summary judgment on this claim, Nationstar can  
16 prevail merely by pointing out to the district court that there is an absence of evidence to  
17 support Plaintiffs' case. *Celotex Corp.*, 477 U.S. at 325. The Court finds that neither  
18 party meets its burden for summary judgment here.

19 Factual disputes exist as to Plaintiffs' allegations that Nationstar failed to obtain a  
20 complete file from the prior loan servicer, that Nationstar ignored Ms. Hunter's loan  
21 modification application, and that Nationstar failed to properly consider Plaintiffs for  
22 loan modifications for which they were eligible. Dkt. # 76 at 14-16, 24-25; Dkt. # 91 at  
23 16-21. Indeed, the parties' conflicting statements about missing documents and whether  
24 loan modifications were available and could have been considered require a weighing of  
25 evidence. *See* Dkt. # 91 at 19-21; Dkt. # 102 at 11. Nationstar's argument that no  
26 evidence exists to support Plaintiffs' allegations here ignores evidence presented by  
27 Plaintiffs, including a deposition by Plaintiffs' housing counselor, Brian Carl, Dkt. # 78

1 at 2-3, expert witness reports by Diane Cipollone, Dkt. 77-1, and Jay Patterson, Dkt. #  
 2 77-3, and Nationstar's own deposition, *see* Dkt. # 76 at 14-15, all of which require  
 3 consideration by a jury. The existence of material factual disputes with respect to  
 4 allegations of unfair or deceptive practices precludes summary judgment for either party  
 5 on this issue.

6 *b. Injury and Causation*

7 Nationstar alleges that it is entitled to summary judgment nonetheless "for the  
 8 independently-sufficient reason that Plaintiffs cannot demonstrate any injury for purposes  
 9 of the CPA." Dkt. # 91 at 25. Nationstar argues that interest and charges on the loan  
 10 were accumulating long before it took over servicing of the loan and they are consistent  
 11 with the terms of the loan. *Id.* Following this argument, Nationstar contends that  
 12 Plaintiff cannot establish causation because "[t]here is simply no evidence of any injury  
 13 connected to Nationstar's conduct." *Id.* at 26.

14 However, as the Court already noted in its prior order, the injury element in a CPA  
 15 claim may be met where "a more favorable loan modification would have been granted  
 16 but for bad faith in mediation." Dkt. # 61 at 10 (citing *Frias*, 334 P.3d 529, 538). Here,  
 17 similar to the plaintiff in *Frias*, Plaintiffs allege that they were denied the opportunity to  
 18 obtain a loan modification because Nationstar did not participate in mediation in good  
 19 faith. Dkt. # 102 at 19. This would establish injury. Because causation is inextricably  
 20 linked with whether Nationstar committed deceptive or unfair acts, it too requires a  
 21 factual analysis by a jury and cannot be decided as a matter of law.

22 Based on the factual disputes with respect to the first element of CPA claim, the  
 23 Court **DENIES** summary judgment to both parties on this claim.

24 *c. Keith Hunter Standing*

25 Nationstar argues that it is entitled to summary judgment on the CPA claim to the  
 26 extent it is asserted by Keith Hunter as opposed to Ms. Hunter because he is not a party to  
 27 the loan. Dkt. # 91 at 26-27. A CPA claim, however, does not have to be "predicated on



1 an underlying consumer or business transaction.” *Panag*, 204 P.3d 885, 890 (Wash.  
 2 2009). Indeed, the Supreme Court of Washington has emphasized that the CPA allows  
 3 “[a]ny person who is injured in his or her business or property by a violation” of the act  
 4 to bring a CPA claim” and that “[n]othing in this language requires that the plaintiff must  
 5 be a consumer or in a business relationship with the actor.” *Id.* Here, it is undisputed  
 6 that Keith Hunter had rights to the property, lived on the property, ran a business from it,  
 7 and made investments on it. Dkt. # 102 at 21. Nationstar had met with Keith Hunter to  
 8 be evaluated for a loan modification to avoid foreclosure on the property and knew that  
 9 Keith Hunter had been given survival rights to the property. *Id.* The totality of  
 10 circumstances presented to the Court reveals that Nationstar was treating Keith Hunter as  
 11 someone who was injured in his business or property. The Court therefore **DENIES**  
 12 summary judgment to Nationstar on the issue of standing.

13 *2. Breach of Contract & Duty of Good Faith and Fair Dealing Claims Against*  
 14 *Nationstar*

15 Nationstar claims it is entitled to summary judgment on the two remaining claims  
 16 for breach of contract and breach of the duty of good faith and fair dealing. Dkt. # 91 at  
 17 27. Plaintiffs do not move for summary judgment on either claim.

18 In their Third Amended Complaint, Plaintiffs allege that Nationstar breached the  
 19 terms of the promissory note by failing to adjust the interest rate and monthly payments  
 20 as required. Dkt. # 51 at 25. Nationstar alleges that these claims fail because “the  
 21 evidence established that Nationstar did properly adjust the Loan’s interest rate at all  
 22 times, and because there is no evidence in this record that the Loan did not properly  
 23 recast.” Dkt. # 91 at 27. Nationstar claims that the loan “remains due for the November  
 24 2011 payment when the interest rate was 7.25 percent, and Nationstar’s monthly  
 25 mortgage statements reflect that reality.” *Id.* at 28. The Court disagrees. The monthly  
 26 mortgage statements do not reflect that the interest rate was 7.25 percent in November  
 27 2011, but instead indicate that the interest rate is 7.25 percent “until 03/01/2017.” Dkt.

# 77-5 at 62. This raises questions as to whether Nationstar properly adjusted the interest rate pursuant to the terms of the Note and thereby precludes summary judgment on either of these claims. *Celotex Corp.*, 477 U.S. at 325. The Court **DENIES** summary judgment to Nationstar on both claims.

### C. Claims Against HSBC

#### 1. CPA claim

In Plaintiffs' motion for summary judgment, Plaintiffs allege that HSBC violated the CPA when it did not prepare for or participate in the mediation and is liable as the beneficiary for Nationstar's alleged conduct in violation of the CPA pursuant to the FFA. Dkt. # 76 at 27. Plaintiffs claim that HSBC is vicariously liable under the CPA because both BANA and Nationstar were HSBC's servicing agents. *Id.* at 28.

In its cross-motion for summary judgment, HSBC claims that Plaintiffs' CPA claim fails because "the single theory of liability that survived HSBC's prior motion to dismiss—that HSBC was not in possession of the original Note—is contradicted by the record evidence." Dkt. # 93 at 10. Moreover, HSBC contends that evidence shows that HSBC held the original note through its agent, Nationstar, "at all relevant times." *Id.* at 11. HSBC further argues that Plaintiffs cannot establish an unfair or deceptive act, injury, or causation as required for a CPA claim. *Id.* at 10-11. Finally, HSBC asserts that Plaintiffs' vicarious liability theory fails because they cannot prove that HSBC retained the ability to control its servicers. *Id.* at 11. HSBC raises the same argument as Nationstar with respect to Keith Hunter's standing in the CPA claim. The Court incorporates its analysis and conclusion in Nationstar's identical argument above to **DENY** summary judgment on HSBC's argument on this matter.

#### a. Possession of the Note

In their Third Amended Complaint, Plaintiffs asserted that HSBC is liable under the CPA because it violated the Deed of Trust Act by not possessing a "hard copy of the original promissory note." Dkt. # 51 at ¶¶ 208-10. Plaintiffs do not raise this argument

1 in their motion for summary judgment. HSBC does raise it, however, seeking summary  
2 judgment on the claim that its alleged failure to physically possess the Note constitutes an  
3 unfair or deceptive act.

4 HSBC contends that it has been in physical possession of the original Note via its  
5 servicing agent Nationstar from April 18, 2014 to the present. *Id.* at 12; Dkt. # 77-5 at 2;  
6 Dkt. # 97 at 30. Plaintiffs argue that it is unclear whether Nationstar actually possesses  
7 the Note because it has not been produced, Nationstar has refused to identify the chain of  
8 custody, and HSBC has not cooperated in providing discovery. Dkt. # 102 at 25. While  
9 state law requires that a trustee has proof that the beneficiary is the holder of any  
10 promissory note, *see* RCW 61.24.030(7), this Court has found that “courts have rejected  
11 other plaintiffs’ attempts to bring a cause of action based on a beneficiary’s failure to  
12 produce original notes.” *Mikhay v. Bank of Am., N.A.*, No. 2:10-CV-01464 RAJ, 2011  
13 WL 167064, at \*2 (W.D. Wash. Jan. 12, 2011).

14 Plaintiff argues that even if HSBC is the holder of the Note now, the foreclosure  
15 proceedings were initiated in 2012, “when BANA told the Hunters their loan would be  
16 referred to foreclosure by HSBC.” Dkt. # 102 at 25. Because there is a factual dispute  
17 about who was in possession of the Note at that time, which is material to Plaintiffs’  
18 claim against HSBC, summary judgment cannot be granted on this matter. The Court  
19 **DENIES** HSBC’s motion for summary judgment on this matter.

20 *b. CPA Violation in Connections with Foreclosure Mediation*

21 Under the FFA, the “beneficiary or an authorized agent” must meet with the  
22 borrower in person for foreclosure mediation proceedings. RCW 61.24.163(8)(a).  
23 HSBC affirms that “Nationstar is HSBC’s attorney in fact and was its authorized agent to  
24 engage in foreclosure mediations on HSBC’s behalf.” Dkt. # 93 at 13. HSBC does not  
25 dispute that Nationstar was acting as its agent in the foreclosure mediation. Instead,  
26 HSBC reasserts Nationstar’s arguments with respect to Nationstar’s allegedly unfair or  
27 deceptive acts during the foreclosure mediation. *Id.* at 12-13.

1 The Court's conclusion that factual issues preclude summary judgment on  
 2 allegations that Nationstar committed an unfair or deceptive act in the mediation applies  
 3 here. HSBC's arguments on injury and causation, which reflect the same arguments  
 4 advanced by Nationstar, are similarly rejected as meritless. The Court therefore **DENIES**  
 5 HSBC's motion for summary judgment on this issue.

6 *c. Vicarious Liability*

7 Finally, HSBC argues that it is entitled to summary judgment because it cannot be  
 8 held vicariously liable for the acts of BANA and Nationstar.<sup>3</sup> Dkt. # 93 at 14-15. HSBC  
 9 contends that a principal is "only liable for the activity of its agent that the principal has  
 10 the right to control." *Id.* at 14 (citing *Kroshus v. Koury*, 633 P.2d 909, 913 (Wash. Ct.  
 11 App. 1981) (principal liable only for agent's activities over which principal has a right of  
 12 control); *see also Stephens*, 159 P.3d at 27 ("The right to control is indispensable to  
 13 vicarious liability.")). HSBC argues that Plaintiffs have not met their burden to  
 14 demonstrate that HSBC maintains control over day-to-day servicing of HSBC's servicing  
 15 agents. Dkt. # 93 at 14. HSBC contends that this is because HSBC's role is limited to  
 16 "simply overseeing the pool of loans in the trust pursuant to the applicable pooling and  
 17 servicing agreement." *Id.* at 15. Plaintiffs note that Nationstar too claims that HSBC had  
 18 no right to control its conduct. Dkt. # 102 at 26.

19 Because Plaintiffs will bear the burden of proof at trial, HSBC can prevail by  
 20 pointing out that there is an absence of evidence to support Plaintiffs' argument. *Celotex*  
 21 *Corp.*, 477 U.S. at 325. Indeed, Plaintiffs fail to identify any evidence demonstrating that  
 22 HSBC, in fact, has control over Nationstar in its servicing activities. In the absence of  
 23 any such evidence, the Court **GRANTS** summary judgment in favor of HSBC on this  
 24 issue. *See Reisinger v. Deutsche Bank Nat. Tr. Co.*, 174 Wash. App. 1060 (2013)

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25  
 26 <sup>3</sup> The Court excludes HSBC's liability for Nationstar's specific conduct as its agent in  
 27 foreclosure mediation proceedings discussed in the preceding section from its discussion  
 28 of vicarious liability for other acts of BANA and Nationstar in servicing the loan.

1 (holding that summary judgment in favor of beneficiary was proper because the plaintiffs  
2 “submitted no evidence of control in their summary judgment materials”).

3 **IV. CONCLUSION**

4 For the reasons stated above, the Court **GRANTS in part and DENIES in part**  
5 Plaintiffs’ Partial Motion for Summary Judgment (Dkt. # 76); **DENIES** BANA’s Motion  
6 for Summary Judgment (Dkt. # 90); **DENIES** Nationstar’s Motion for Summary  
7 Judgment (Dkt. # 91); and **GRANTS in part and DENIES in part** HSBC’s Motion for  
8 Summary Judgment (Dkt. # 93).

9  
10 DATED this 11th day of March, 2021.

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13 The Honorable Richard A. Jones  
14 United States District Judge  
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